89-18

Supreme Court, U.S.
FILED
JUL 6 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM. 1988

BARBARA WINER — PETITIONER

vs.

GARY C. NIXON, PRESIDENT
ACTION RENT-A-CAR & TRUCKS, INC.
T/A ACTION AUTOMOTIVE — RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

Barbara R. Winer
Petitioner in Pro Se
P.O. Box 122
Tarzana, CA 91357-0122
(818) 377-3245
(818) 994-8482

QUESTION PRESENTED

A. DID THE SUPREME COURT OF VIRGINIA DENY THE PETITIONER DUE PROCESS OF LAW, WHEN IT SUSTAINED A LOWER COURT'S RULING OF RES JUDICATA AGAINST HER CAUSE OF ACTION, WHICH, IN A FORMER PROCEEDING, HAD BEEN DISMISSED WITHOUT PREJUDICE?

TABLE OF CONTENTS

Page

QUESTION PRESENTED

A. DID THE SUPREME COURT OF VIRGINIA DENY THE PETITIONER DUE PROCESS OF LAW, WHEN IT SUSTAINED A LOWER COURT'S RULING OF RES JUDICATA AGAINST HER CAUSE OF ACTION, WHICH, IN A FORMER PROCEEDING, HAD BEEN DISMISSED WITHOUT PREJUDICE? (i)

Table of Authorities Cited (iii,iv)

I. OPINION BELOW 1

II. JURISDICTION 2

III. CONSTITUTIONAL PROVISIONS INVOLVED

A. THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION 2

B. THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION 3

C. ARTICLE VI, CLAUSE 2, OF THE UNITED STATES CONSTITUTION 3

IV. STATEMENT OF FACTS 4

V. REASONS FOR GRANTING THE WRIT

A. IF NOT NULLIFIED, THIS ARBITRARY, OMINOUS, AND VERY DANGEROUS PRECEDENT, WOULD JEOPARDIZE THE CONSTITUTIONAL RIGHTS OF OTHER UNITED STATES CITIZENS. 12

B. MOST UNITED STATES CITIZENS HAVE A VESTED INTEREST IN THE LEGAL, MORAL AND HUMAN ISSUES PRESENTED BY THE TOTALITY OF THIS CASE. 13

VI. CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Brinkerhoff-Faris Trust and Sav. Co. v. Hill,
281 U.S. 673,677,678 (1930) 10

Cumberland Coal Co. v. Board,
284 U.S. 23,24,25 (1931) 10

Great Northern Ry Co. v. Sunburst Oil & Ref. Co.,
287 U.S. 358,366,367 (1932) 10

Herndon v. Georgia,
295 U.S. 441,443,444 (1935) 10 ,11

Missouri ex.rel. Missouri Ins. Co. v. Gehner,
281 U.S. 313,320 (1930) 10

Pruneyard Shopping Center et.al. v. Robins et.al,
447 U.S. 74,85,86 (1980) 11

Saunders v. Shaw,
244 U.S. 317,318,320 (1917) 10

RULES AND STATUTES

62 Stat. 929, 28 U.S.C. §1257 (3) 2

OTHER SOURCES

Adams v. Pugh's Adm'r,
716 Va. 797, 83 S.E. 370(1914) 5

Article VI, Clause 2, of the United States Constitution 3 ,12

OTHER SOURCES, CONT'D

	Page.
First Amendment of the United States Constitution	3,9,12
Fourteenth Amemdment of the United States Constitution	2,9,12
Tarter v. Wilson, 95 Va. 19,27 S.E. 818 (1897)	7
Thomas Jefferson, "Virginia Statute of Religious Liberty (1786)", in Documents of American History, Ninth Ed, ed. Henry Steels Commanger. (N.Y., N.Y., Appleton-Century Crofts Educational Division, Meredith Corp.) p.126.	14

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA IN RICHMOND, VIRGINIA

Petitioner, Barbara Winer, in pro se, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Virginia entered in the above-entitled cause on April 21, 1989.

I.

OPINION BELOW

The Order to deny the Petition for Rehearing is attached as appendix A.

The Order to dismiss the Petitioner's Cause of Action, without prejudice, is attached as appendix B-C.

The Order to bar the Petitioner's Cause of Action is attached as appendix D-E.

The "certified as amended" Written Statement of Facts is attached as appendix F-K.

The Warrant in Debt is attached as appendix L-M.

– The Order to deny the Petition for Appeal is attached as appendix N.

The Order to defer the issuance of the mandate is attached as appendix O.

II.

JURISDICTION

The Petition for Rehearing was denied on April 21, 1989. The jurisdiction of this Court is invoked pursuant to 62 Stat. 929, 28 U.S.C. §1257 (3).

III.

CONSTITUTIONAL PROVISIONS INVOLVED

A. The Fourteenth Amendment of the United States Constitution provides:

All persons born or naturalized in the United States subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of the laws.

B. The First Amendment of the United States Constitution provides:

Citizens shall make no law respecting an establishment of religion, or prohibiting the free exercize of; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the government for a redress of grievances.

C. Article VI, Clause 2, of the United States Constitution provides:

The Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution

or laws of any state to the contrary notwithstanding.

(Emphasis added to pertinent sections.)

IV.

STATEMENT OF FACTS

On June 8, 1988, the Petitioner's Cause of Action, At Law No. 82590, was dismissed, without prejudice. (Appendix B-C).

On July 22, 1988, said Cause of Action was refiled and assigned At Law No. L085911.

On August 12, 1988, the Defendants' filed a Plea in Bar and prayed that At Law L085911 be barred on the basis of res judicata or collateral estoppel.

On September 9, 1988, the Court granted the Defendants' plea on the basis of res judicata. (Appendix D,E, and J #4).

On September 20, 1988, the Petitioner filed a Motion to Set Aside Verdict and to Rehear, and scheduled said Motion for argument on November 4, 1988.

On October 7, 1988, final judgment was entered to bar At Law L085911. (Appendix D-E).

On October 24, 1988, the Petitioner filed a Notice of Appeal.

On November 4, 1988, the Court refused to hear arguments on the Motion to Set Aside Verdict and to Rehear.

The Petitioner perfected her Petition for Appeal. In said appeal, she argued that the ruling of res judicata against At Law L085911 is unlawful and in error,.....demonstrated that the lower Court was arbitrary and biased against her Cause,.....and inferred that her constitutional right to due process was abrogated by the Court's arbitrary adjudication:

A. An assignment of error was given to the fact that,

"Three Months After WINER's Cause was dismissed without prejudice, (said decision was not appealed by ACTION), ACTION's Plea in Bar was Granted on the basis of res judicata."

To support the error, she cited Adams v. Pugh's Adm'r, 716 Va. 797, 83 S.E.370,(1914), which held that when, in a former proceeding. a petition was dismissed without prejudice, there

was no res judicata because that former judgment could not be relied upon as a final adjudication of the matter in controversy.

B. The Petitioner demonstrated that the lower Court was arbitrary and biased against her Cause by proving that the lower Court's amendments on the Written Statement of Facts misrepresented the truth: (Appendix H):

(a.) The Court's amendment of paragraph Bb to read that the Petitioner was awarded $169.75 in compensatory damages,....is not true. This amendment misrepresents the abstract of judgment on the Warrant in Debt,(Appendix L-M), and is inconsistent with unamended sentences in said Statement, which assert the truth,...,that the Petitioner was awarded $150.00 in actual damages,...plus Court costs. (Appendix G,par.a, and Appendix H, par. a.)

(b.) The Court's amendments which deleted the words,.."Although not formally pleaded and therefore not at issue at the time of the December 9, 1987 trial,".....and which replaced the words,.."did not hear any argument for,"...with the word, "awarded",...are not true.

Said amendments controvert an elementary principle of law, cited as the holding in Tarter v. Wilson, 95 Va. 19,27, S.E. 818 (1897), which states that claims of parties must be formally presented to the Court and duly passed upon for a matter to be res judicata.[1.]

C. Referenced by the aforementioned facts, and by just and necessary inference to her constitutional right to due process, the Petitioner complained that the defense of res judicata defeated the ends of justice because it was construed to keep her out of Court.[2.]

---

1. Said amendments support the Defendants' argument that compensatory/punitive damages were, or could have been presented to the Court at the December 9, 1987 trial. However, at that time, the Defendants', who defaulted said trial, had been served with only the Warrant in Debt, (Appendix L-M). Based upon said Warrant, the Court had no jurisdiction over, and did not hear, those issues.

2. It is apparent that the Court was aware of its inconsistent rulings. In the "certified as amended"Written Statement of Facts, it allowed the statement that indicated the Petitioner's Cause of Action was dismissed without prejudice to co-exist with the statement that indicated said cause was barred on the basis of res judicata. (Appendix G,par.b, and Appendix J, #4).

On February 17, 1989, the Petitioner argued, by telephone conference, before the Supreme Court of Virginia:

A. The Petitioner amplified the arguments presented in the Petition for Appeal.

B. Additionally, she made reference to the Defendants' Brief in Opposition. She argued, that in said Brief, the Defendants' failed,...to even attempt,...to address the assignment of error given to the fact that after her Cause was dismissed without prejudice, it was later barred on the basis of res judicata. She argued that this fact, alone, is fatal to the Defendants' case.

On March 7, 1989, the Supreme Court of Virginia denied the Petition for Appeal. (Appendix N).

On March 20, 1989, the Petitioner filed a Petition for Rehearing. To said Petition, she attached a copy of the Order which dismissed her Cause without prejudice. (Appendix B-C).

In said Petition for Rehearing:

A. The Petitioner assigned an error to the fact that,

"The adjudication to deny WINER's Petition, denies WINER due process."

(a.) The Petitioner argued that the arbitrary adjudication to deny her Appeal deprives her of her Fourteenth Amendment rights to a fair and impartial ruling, and to equal protection of the laws. Consequently, she is being deprived of her fundamental right to a day in Court, and of her absolute right to defend her property entitlement from her Cause of Action.

(b.) By embodiment in the Fourteenth Amendment, and by just and necessary inference in said Petition, the Petitioner's First Amendment right to freedom of speech was abridged, as said adjudication abrogated her First Amendment right to petition the government for a redress of her grievance.

B. The Petitioner requested the Supreme

Court of Virginia to take "judicial notice" of basic legal principles that preclude the adjudication of res judicata against At Law L085911:

(a.) A dismissal of a Cause of Action without prejudice is an automatic bar to a later defense of res judicata;

(b.) A Court cannot, arbitrarily, reverse its first decision and make a second ruling inconsistent with that decision.[3.]

---

3. The adjudication made, by the Supreme Court of Virginia, to sustain the ruling of res judicata against a Cause of Action which had, previously been dismissed without prejudice, is arbitrary, unprecedented, purposely discriminatory, and could not have been anticipated.

Therefore, the Federal question was timely raised as an "Assignment of Error" in the Petition for Rehearing according to Missouri ex. rel. Missouri Ins.v. Gehner,281 U.S. 313,320 (1930); Brinkerhoff-Faris Trust and Sav. Co.v. Hill, 281 U.S. 673,677,678 (1930); Great Northern Ry Co. v. Sunburst Oil & Refining Co.,287 U.S. 358,366,367 (1932); Herndon v. Georgia, 295 U.S. 441,443,444 (1935); Saunders v. Shaw, 244 U.S. 317,318,320 (1917).

Furthermore, that the Federal question was brought to the attention of the Court with due precision, and that the Court considered said question before it denied the Petition for Rehearing, (Appendix A), gives the U.S. Supreme Court jurisdiction over this case according to Cumberland Coal Co. v. Board, 284 U.S.23,24,26, (1931); Great Northern Ry Co. v. Sunburst Oil & Ref. Co.,287 U.S.358,366,367 (1932); Herndon v.

On April 21, 1989, the Supreme Court of Virginia denied the Petition for Rehearing. (Appendix A).

On May 2, 1989, a Mandate to Defer Judgment was filed with the Supreme Court of Virginia.

On June 7, 1989, said Mandate was granted. (Appendix O).

Georgia, 295 U.S. 441,443; Pruneyard Shopping Center et.al. v. Robins et.al. 447,U.S. 74,85, 86,(1980).

V.

REASONS FOR GRANTING THE WRIT

A. IF NOT NULLIFIED, THIS ARBITRARY, OMINOUS, AND VERY DANGEROUS PRECEDENT, WOULD JEOPARDIZE THE CONSTITUTIONAL RIGHTS OF OTHER UNITED STATES CITIZENS.

The Supreme Court of Virginia, for no legitimate or state compelling reason, arbitrarily decided that At Law L085911 would not be publically heard, and made a capricious, unlawful and unprecedented ruling, purposely contrived to keep said Cause, and one United States Citizen, out of Court. [4.]

The United States Supreme Court must abolish this dangerous precedent, and make a statement to remind all judges, that in our Nation of laws, their allegiences must be to uphold the values which underlie the Supreme Law of the Land, the United States Constitution. [5.]

If not nullified, this deplorable and

---

4. This act violates U.S.Constitution Amendments One and Fourteen, and Article VI, Clause 2.

5. U.S.Constitution, Article VI, Clause 2.

ominous precedent would influence other Courts with dire results; ---for, if the constitutional rights of one United States Citizen could be so arbitrarily abrogated, the rights of all, are in jeopardy.

B. MOST UNITED STATES CITIZENS HAVE A VESTED INTEREST IN THE LEGAL, MORAL AND HUMAN ISSUES PRESENTED BY THE TOTALITY OF THIS CASE.

The issues presented by this Writ of Certiorari, and the controversial issues surrounding At Law L085911, are of importance to all concerned with judicial and legal ethics, and to all who wish to remain free from arbitrary government.

Additionally, At Law L085911 is about Credit Card Fraud, and is pertinent to all who carry credit cards.

Of no less significance, is that the vast majority of Americans have an interest in the human conflicts presented by this case, as most

will identify with some, if not all, aspects of that conflict.

Although the injustices and inequities presented, by the totality of this case, are several and gross,.....positively speaking, the exposure of said controversies can stimulate introspection, debate, learning, progress and growth,.....for,

> "that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapon, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them." 6.

---

6. Thomas Jefferson, "Virginia Statute of Religious Liberty (1786)", in Documents of American History, Ninth Ed., ed. Henry Steels Commanger, (N.Y.,N.Y., Appleton-Century-Crofts, Educational Division Meredith Corp.) p.126.

VI.

CONCLUSION

That any State Supreme Court,...or that any Court of Law,...for no legitimate reason,... could act with such deliberate defiance towards the United States Constitution,...with such arbitrary antagonism toward justice,...and with such palpable prejudice toward the Constitutional rights of one United States Citizen,...signifies that it is timely for the United States Supreme Court to make a statement to maintain the virtue and integrity of the Courts, to preserve the deeply rooted American values of freedom and fair play, and to champion, "equal justice under law", for all.

The preservation and evolution of our judicial system is essential,....as it is the basis of our democracy.

For the Soul of our Nation, the United States Supreme Court must continue to uphold the rudiment of due process,.... the protection

of the individual against the arbitrary action of government.

Respectfully submitted,

Barbara R. Winer

Barbara R. Winer
P.O. Box 122
Tarzana, California
19537-0122

(818) 377-3245
(818) 994-8482

Dated: July 3, 1989.

SUPREME COURT OF VIRGINIA

April 21, 1989

Docket No: 881387
Circuit Court No.L-85911

Barbara Winer Appellant.

v.

Gary C. Nixon, President, etc. Appellee.

Upon A Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 7th day of March, 1989 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Testee:

David A. Beach

Clerk

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

June 8, 1988 Docket No: AT LAW 82590

BARBARA WINER,

Plaintiff,

v.

GARY C. NIXON, PRESIDENT
ACTION RENT-A-CAR & TRUCKS, INC.
T/A ACTION AUTOMOTIVE

Defendants.

ORDER

THIS MATTER came to be heard on this 8th day of June, 1988 on the defendant's Motion to Withdraw Appeal, and it appearing to the Court that said Motion is proper, it is therefore ORDERED, ADJUDGED AND DECREED that said Motion is GRANTED, ~~and this cause is DISMISSED with prejudice~~. (LHG)

ENTERED THIS 8th DAY OF JUNE, 1988.

Lewis Hall Griffith

JUDGE
Circuit Court

I ASK FOR THIS:

Todd D. Bunn

Todd D. Bunn
THACHER, SWIGER, SWEENY & DAY
3975 University Drive, Suite 450
Fairfax, Virginia 22030
(703) 385-7000
Counsel for Defendant

SEEN & objected to:

Barbara Winer
Barbara Winer
18653 Ventura Boulevard
Number 747
Tarzana, California 91356
Plaintiff pro se

Clerk is directed to pay over the appeal bond.

Lewis Hall Griffith
Judge

6/8/88

Note: The Plaintiff objected to the fact that the Defendants withdrew their Appeal.

C.

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

October 7, 1988 Docket No. AT LAW L08591

BARBARA WINER

Plaintiff,

v.

GARY C. NIXON, PRESIDENT
ACTION RENT-A-CAR & TRUCKS, INC.
T/A ACTION AUTOMOTIVE

Defendants.

ORDER

ON THIS DAY, came the parties before this Honorable Court and presented argument on the Defendant's Plea in Bar, the Defendant's Demurrer and the defendant's Motion for the Assessment of attorneys fees, and

AND IT APPEARING TO THE COURT that the defendant's Plea in Bar is proper; it is hereby

ADJUDGED, ORDERED and DECREED that the defendant's Plea in Bar is granted, and it is further

ADJUDGED, ORDERED and DECREED that the defendant's Motion for the Assessment of Costs is denied, and it is further

ADJUDGED, ORDERED, and DECREED that the plaintiff's Motion for the Assessment of Costs is

D.

denied, and it is further

ADJUDGED, ORDERED and DECREED that this cause is dismissed with prejudice.

ENTERED this 7th day of October, 1988.

Lewis Hall Griffith
JUDGE

I ASK FOR THIS:

By: Todd D. Bunn
Todd D. Bunn
Counsel for Plaintiff
THACHER, SWIGER, SWEENY & DAY
3975 University Drive
Suite 450
Fairfax, Virginia 22030
(703) 385-7000

SEEN:

By: _____
Barbara Winer
18653 Ventura Blvd. 747
Tarzana, California 91356

A COPY TESTE:
WARREN E. BARRY CLERK
By: Verna L. Butz
Deputy Clerk

V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

November 7, 1988 Docket No: AT LAW L085911

BARBARA WINER

Plaintiff,

v.

GARY C. NIXON,PRESIDENT
ACTION RENT-A-CAR & TRUCKS
T/A ACTION AUTOMOTIVE

Defendant.

WRITTEN STATEMENT OF FACTS

On September 9, 1988, the Plaintiff, Barbara Winer, in pro se, and the Defendant, by counsel, came before the Honorable Judge L.H. Griffith, in the Circuit Court of Fairfax County.

The Defendant presented arguments for his Plea in Bar, Demurrer, and his Motion for Assessment of Attorney's Fees.

The Plaintiff presented arguments against the Defendant's Motions.

The Plaintiff, after receiving notice of the Defendant's Motions, had placed her Motion for Assessment of Costs on the September 9, 1988 docket.

1. THE COURT HEARD the Defendant's Plea in Bar.

A. The Defendant argued that his Plea be

sustained on the basis of res judicata or collateral estoppel. The Defendant displayed the Plaintiff's Warrant in Debt #87-19048, filed on/ about August 10, 1987, and argued that the Plaintiff's formally pleaded suit #L085911 be barred.

a. The Plaintiff argued, in the Plaintiff' Argument Against Defendant's Plea in Bar, that the Defendant's Plea be precluded because at trial on June 8, 1988, when the Defendant withdrew his appeal from the December 9, 1987 verdict which, based upon the Warrant in Debt and a car rental contract, awarded the Plaintiff her actual damages of $150.00 plus Court costs, the Defendant then tried to dismiss the Plaintiff's Cause of Action as formally pleaded in her suit L085911. At trial in June, the Defendant submitted an Order to the presiding judge, Judge Griffith, requesting permission to withdraw his appeal, and requesting that this matter be dismissed with prejudice.

b. The Plaintiff argued in her Argument, that although the Judge allowed the Defendant to withdraw his appeal, the Judge did not dismiss the Plaintiff's cause with prejudice. Therefore, in her Argument, the Plaintiff argued that the

Defendant should be precluded from relitigating the issue, in his plea, of dismissing the Plaintiff's cause.

B. The Defendant argued, in his plea, that at trial on December 9, 1987, when Judge Waters awarde the Plaintiff her actual damages, that this was a complete adjudication of all facts at issue.

a. The Plaintiff stated in her Argument, that on December 9, 1987, the Defendant defaulted the trial, and Judge Waters awarded her a default judgment of $150.00 plus Court costs. The Plaintif had asked for actual damages of $169.75. On December 9, 1987, Judge Waters based his decision for the Plaintiff's actual damages on the basis of the car rental agreement contract.

b. ~~Although not formally pleaded, and therefore not at issue at the time of the December 9, 1987 trial~~, the Plaintiff had indicated on the Warrant in Debt that she sought Compensatory and Punitive damages. At trial, on December 9,1987, Judge Waters ~~did not hear any argument for~~ AWARDED the Plaintiff's $169.75 Compensatory ~~or Punitive~~ damages. (LHG)

C. As stated in her Argument, after trial on December 9, 1987, the Defendant, by his Motion to Vacate, set aside the Plaintiff's award and asked

that the case be tried on its merits in a new trial or hearing.

a. Subsequently, the Plaintiff filed her suit L085911, which, although it arose from the same transaction as mentioned on the Warrant in Debt, formally pleaded new facts and formally stated a Cause of Action as Credit Card Fraud, Virginia Code 18.2-195(2)(b).

b. Nevertheless, the Defendant argued in his plea, that there is an identity of issues, remedies, quality of person and cause in the Plaintiff's Warrant in Debt #87-19048 and in the Plaintiff's new suit L085911.

c. Whereas the Plaintiff concurred in her Argument that there is an identity of parties and quality of person, the Plaintiff argued that these facts are not sufficient to sustain the Defendant's Plea in Bar.

d. The Plaintiff, in her Argument, qualified the Defendant's allegations that there is an identity of remedy in both suits, and mentioned that she tried to mitigate her damages by settling out of Court before she filed suit.

2. THE COURT HEARD the Plaintiff's Argument Against Defendant's Plea in Bar and the Plaintiff's Argu-

ment Against Defendant's Demurrer.

3. THE COURT HEARD the Defendant's Demurrer and t
Defendant's Motion for Assessment of Costs.

4. THE COURT GRANTED the Defendant's Plea in Bar on the basis of res judicata.

5. THE COURT DENIED the Defendant's Motion for Assessment of Attorney's Fees.

6. THE COURT ~~DID NOT HEAR~~ DENIED THE PLAINTIFF'S argument on the Plaintiff's Motion for Assessment of Costs. (L.H.G.)

7. The Court entered final judgment on October 7, 1988.

8. THE PLAINTIFF, who resides out of state and could not be present on October 7, 1988 for entry o judgment, has ordered a copy of said judgment so th she can sign her objection to the ruling and file her objection with the Court.

9. The Plaintiff sent the Defendant a Written Statement of Facts on October 19, 1988 along with a accompanying letter stating that she sent Judge Griffith a copy of said Written Statement of Facts in accordance with rule 5:11 of the Supreme Court of Virginia.

10. The Plaintiff received the Defendant's objection to a Statement of Facts that she had sent the

J.

Defendant on or about October 13, 1988.

11. In order to make her Statement of Facts sufficient, the Plaintiff revised said Statement and sent a copy of said revision to the Defendant and to Judge Griffith on October 25, 1988. Along with this Statement, the Plaintiff informed the Defendant that this revised Statement was sent to Judge Griffith pursuant to rule 5:11 of the Supreme Court of Virginia.

_____
Judge

BY: Barbara Winer
Barbara Winer, Plaintiff in pro se
18653 Ventura Blvd. 747
Tarzana, CA 91356

Seen By:

_____
Todd D. Bunn
Counsel for Defendant
Thacher, Swiger, Sweeny & Day
3975 University Drive
Suite 450
Fairfax, Virginia 22030

November 7, 1988
Certified as Amended
Lewis Hall Griffith
Judge

WARRANT IN DEBT

FAIRFAX COUNTY, General District Court

COURT ROOM 2-A, 4110 Chain Bridge Road, Fairfax, Virginia 22030

December 9, 1987 Docket No: 87-19048

Barbara Winer Plaintiff

v.

Gary C. Nixon, President Defendant
Action Rent-A-Car & Trucks,Inc.
T/A Action Automotive

TO THE DEFENDANT(S): You are summoned to appear before this Court at the above address on Wed. Sept. 9,1987 at 9:30 A.M. to answer the Plaintiff's civil claim (see below).

8/17/87
Date issued

Clerk Fairfax County,Virgini

Claim: Plaintiffs claim that Defendant(s) owe Plaintiff(s) a debt in the sum of $169.75 net of any credits, with interest at__% from_____until paid. $13.00 costs,(postage $22.,xerox $20.,phone $2.63, my time and travel $2,100.,punitive for bad faith $4,500.) and $75.0 attorney's fees with the basis of this claim being My MasterCard was billed for services not received.

Aug. 10, 1987

Barbara Winer
Plaintiff

L.

CASE DISPOSITION

JUDGMENT that Plaintiff recover against named Defendant $150.00 net of any credits, with interest at 8 % from 12/9/87 until paid. $13.00 costs and no attorney's fees.

Homestead Exemption waived? No.

Defendant(s) Present [x] Yes
[ ] No

12/9/87

J. Conrad Waters

Judge

Note: The Defendant was not present at the December 9, 1987 trial. The clerk made a mistake by putting an x in the yes square.

SUPREME COURT OF VIRGINIA

March 7, 1989

Docket No: 881387
Circuit Court No. L-85911

Barbara Winer Appellant.

v.

Gary C. Nixon, President,etc. Appellee.

From the Circuit Court of Fairfax County

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,
Teste:

David B. Beach, Clerk

By:

A.A.
Deputy Clerk

N.

SUPREME COURT OF VIRGINIA

June 7, 1989

Docket No: 881387
Circuit Court No.L-85911

Barbara Winer Appellant.

v.

Gary C. Nixon, President,etc. Appellee.

From the Circuit Court of Fairfax County

Upon consideration of the request of Barbara Winer, in proper person,it is ordered that issuance of the mandate in this case be, and the same hereby is deferred, to and including the 20th day of July,1989,on the expiration of which time the same may be issued,unless before that time a notice of appeal to the Supreme Court of the United States has been filed in accordance with the Rules of the Supreme Court of the United States and the case is thereafter docketed therein within the time provided by the Rules of that Court, in which event issuance thereof shall be deferred until the final determination of the case by that Court.

A Copy,
Testee:

David A. Beach,
Clerk

O.

No. 89-18

In The

Supreme Court of the United States

October Term, 1989

BARBARA WINER,

Petitioner,

v.

GARY C. NIXON, PRESIDENT ACTION RENT-A-CAR AND TRUCKS, INC., T/A ACTION AUTOMOTIVE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

RESPONDENTS' BRIEF IN OPPOSITION

James E. Swiger
Thacher, Swiger & Day
3975 University Drive
Suite 450
Fairfax, Virginia 22030
(703) 385-7000
Counsel of Record for Respondents
Todd D. Bunn on Brief

QUESTION PRESENTED

I. Did the Supreme Court of Virginia err when it denied the petitioner a writ of certiorari after the trial court sustained a plea in bar on a theory of res judicata after the dismissal of a prior proceeding?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 7

ARGUMENT 9

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Allstar Towing, Inc. v. City of Alexandria, 231 Va. 421, 344 S.E.2d 903 (1986) 15

Bates v. Deavers, 214 Va. 667, 202 S.E.2d 217 (1774) 15

Croatan Books, Inc. v. Baliles, 583 F. Supp. 857 (1984) 15

Mammoth Mining Company v. GrandCentral Mining Company, 213 U.S. 72, 53 L. Ed. 702, 29 S. Ct. 413 (1909) 9

Mowry v. City of Virginia Beach, 198 Va. 205, 93 S.E.2d 323 (1956) 13

STATEMENT OF THE CASE

On July 26, 1986, the petitioner Barbara Winer, rented an automobile from the respondent, Action Automotive. As is customary in the industry at the time of the rental, an employee made an impression of Ms. Winer's Mastercard to secure payment. This rental transaction formed the underlying basis for a warrant in debt, Case No. 87-19648, which Ms. Winer, a California resident, filed in the general District Court of Fairfax County, Civil Division, on August 20, 1987. In the aforementioned warrant in debt, Ms. Winer sought $169.75 net of any credits, $13.00 in costs, $22.00 in postage, $20.00 in xeroxing expenses, $75.00 in attorney's fees, $2.63 in telephone expenses, $2,100.00 in time and travel expenses and $4,500.00 "punitive for bad faith" (sic) with the basis of said claim that Ms. Winer's Mastercard was billed for services

not received.

On December 9, 1987 at the conclusion of evidence presented by Ms. Winer ex parte, Judge Waters entered judgment for Ms. Winer in the amount of $150.00 plus court costs in the amount of $13.00 and interest thereon from the date of judgment.

On December 15, 1987, Action Rent-a-Car, et al., by counsel, filed a motion to vacate judgment and rehear in the general District Court of Fairfax County, Civil Division. Accompanying the aforementioned motion was a notice placing this matter on the December 21, 1987 Docket. Subsequent to a denial of the motion by the General District Court, the defendant, by counsel, noted and perfected an appeal of the decision by Judge Waters to the Circuit Court of Fairfax County on December 21, 1987. Ms. Winer was not present in the Court on December 21, 1987. This matter,

identified by Law No. 82590, was placed on the June 8, 1988 Circuit Court trial docket. Prior to the commencement of trial on June 8, 1988, Action Automotive moved for a withdrawal of the defendant's appeal. Over Ms. Winer's objection, Judge Griffith entered an order withdrawing the defendant's appeal and directing the clerk of the court to disburse the appeal bond to Ms. Winer.

On July 22, 1988, Ms. Winer filed a Motion for Judgment in the Circuit Court of Fairfax County to which the clerk of the court assigned Law No. 85911. Ms. Winer stipulates that the underlying transaction which forms the basis of Law No. 85911 is the same rental transaction which formed the underlying basis of the warrant in debt, Case No. 87-19048, which was previously filed and adjudicated in the General District Court of Fairfax County, Civil Division. The respondents

filed a plea in bar on August 12, 1988 as a responsive pleading in the aforementioned cause setting forth as the basis for said plea the doctrine of res judicata or in the alternative collateral estoppel.

The parties presented argument on the defendant's Plea in Bar before the Honorable Lewis Hall Griffith in the Circuit Court of Fairfax County, Virginia on September 9, 1988. At the conclusion of argument, Judge Griffith sustained the defendant's Plea in Bar on the basis of the doctrine of res judicata. On October 7, 1988, Judge Griffith entered an order reflecting his September 9, 1988 decision.

Ms. Winer subsequently sought review of Judge Griffith's October 7, 1988 order. On Tuesday, March 7, 1989, the Supreme Court of Virginia issued a Memorandum Opinion that there was no reversible error in the judgment complaint of, and the

Supreme Court of Virginia accordingly refused the Petition for Appeal.

Ms. Winer then petitioned the Supreme Court of Virginia for a rehearing, and for the first time during the pendency of this cause in any court, she asserted Constitutional grounds as error. By Order dated April 21, 1989, the Supreme Court of Virginia denied the Petition for Rehearing.

Ms. Winer subsequently moved the Supreme Court of Virginia to defer the mandate in this cause while the case is on appeal to the United States Supreme Court. By Order dated June 7, 1989, the Supreme Court of Virginia ordered that the issuance of the mandate in this cause to be deferred to and including the 20th day of July, 1989.

BEST AVAILABLE COPY

SUMMARY OF ARGUMENT

A petition for writ of certiorari of petitioner Barbara Winer should be dismissed for the petitioner failed to preserve a substantial question involving United States Constitution. The first time Ms. Winer asserted any Constitutional error was in petition for rehearing to the Virginia Supreme Court. At no time prior to that had Ms. Winer made any assertion of the United States Constitution during the pendency of this underlying decision of the Circuit Court of Fairfax County, Virginia and the subsequent affirmation of that decision by the Supreme Court of Virginia presents no issues involving any substantial question of Federal Law.

Notwithstanding the foregoing, the decision of the General District Court became a final adjudication of the rights

of the parties regarding all matters plead upon the withdrawal of the defendant's appeal prior to the commencement of the June 8, 1988 trial. A re-litigation of matters plead in the action that was subsequently filed an labeled Law No. 85911 is precluded and the decision of the trial court with regard to the defendant's plea and bar should be affirmed.

ARGUMENT

I. THIS CAUSE LACKS A SUBSTANTIAL QUESTION UPON WHICH TO BASIS AN APPEAL TO THE SUPREME COURT OF THE UNITED STATES, AND FOR THAT REASON PETITION FOR WRIT OF CERTIORARI FILED HEREIN SHOULD BE DENIED.

It is well settled that the Supreme Court of the United States will dismiss an appeal where it appears to the Supreme Court that the proceeding from the State Court turns on a question of fact determined by the state court or on a question solely involving state law, and does not turn on any federal question of law. *Mammoth Mining Company v. Grand Central Mining Company* (1909) 213 U.S. 72, 53 L. Ed. 702, 29 S. Ct. 413.

In this particular cause, Ms. Winer failed to allege any Constitutional error until she petitioned the Supreme Court of Virginia for rehearing. Ms. Winer, simply, failed to properly preserve any Constitutional claims that she may have

had.

Notwithstanding the foregoing, Ms. Winer has not alleged a colorable claim. She has failed to allege any specific injury in regard to the application of the laws of the Commonwealth of Virginia to her. It is well settled that a mere generalized grievance is insufficient. There is simply no error involving the Fourteenth Amendment of the United States Constitution, the First Amendment of the United States Constitution and Article Four, Clause Two of the United States Constitution as alleged by Ms. Winer in her petition for writ of certiorari.

II. **THE DECISION OF THE GENERAL DISTRICT COURT BECAME A FINAL ADJUDICATION OF THE RIGHTS OF THE PARTIES REGARDING ALL MATTERS PLED WHEN THE DEFENDANT'S WITHDREW THEIR APPEAL PRIOR TO THE COMMENCEMENT OF THE JUNE 8, 1988 TRIAL.**

The petitioner erroneously assumes that with the withdrawal of the appeal in the Circuit Court in the first litigation that she has a continuing cause of action. Ms. Winer did not appeal Judge Griffith's June 8, 1988 Order wherein he granted the defendant's Motion to Withdraw the appending appeal. With the withdrawal of the appeal, the decision of the General District Court becomes a final judgment with regard to all matters plead. The warrant in debt filed in the first litigation clearly and unambiguously pleads a prayer for damages including $169.75 net of any credits, $13.00 costs, $22.00 postage, $20.00 xerox, $75.00 attorney's fee, $2.63 phone, $2,100.00

time and travel and $4,500.00 in punitive damages for bad faith with the underlying basis of her claim that her Mastercard was billed for services not received. Judge Water's decision of December 9, 1987 is a full and final adjudication of all matters plead.

III. THE RE-LITIGATION OF MATTERS PLEAD IN LAW NO. 85911 IS PRECLUDED AND THE DECISION OF THE TRIAL COURT WITH REGARD TO THE DEFENDANT'S PLEA IN BAR SHOULD BE AFFIRMED.

It is well settled in the Commonwealth that the doctrine of res judicata is based upon the theory that "one person shall not the second time litigate, with the same person . . . the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined upon the merits by a court of competent jurisdiction, in a judgment in personam in a former suit." *Mowry v. City of Virginia Beach*, 198 Va. 205, 211, 93 S.E.2d 323 (1956). To establish a plea of res judicata it is necessary to show an identity of the parties, an identity of the quality of the parties, and identity of the cause of action, and identity of the remedy. id. It is undisputed that there is an identity

of parties, and identity of the quality parties between the first and second litigation. In each claim, Ms. Winer is the plaintiff and the burden of proof with regard to each and every element plead, while Mr. Nixon and Action Rent-a-Car and Trucks, Inc. t/a Action Rent-a-Car, are defendants in both claims.

In reviewing the complaint filed in the second litigation it is readily apparent that the remedies sought in both causes are identical. The identical underlying transaction has yielded two suits both seeking monetary damages based on essentially the same criteria. Therefore, there is an identity of remedies between the first and second litigation.

A cause of action may be defined as "an assertion of particular legal rights which have arisen out of a definable factual transaction." *Allstar Towing, Inc.*

v. City of Alexandria, 231 Va. 421, 425, 344 S.E.2d 903, 906 (1986), citing *Bates* v. Devers, 214 Va. 667, 672 n8. 202 S.E. 2d. 917, 921, n.8. (1974). Res judicata bars the re-litigation of the same cause of action, or any part which could have been litigated between the same parties. *Bates v. Devers*, 214 Va. 667, 670-71, 202 S.E.2d. 917 (1974). Res judicata precludes the re-litigation of a claim even when the plaintiff is prepared in the second action to present evidence or grounds or theories of the case not presented in the first action. *Croatan Books, Inc. v. Baliles*, 583 F. Supp. 857, 861 (1984).

Even assuming arguendo that Ms. Winer's first claim sounds in contract, she cannot overlook the fact that her second claim, which sounds in tort, requires the same evidence as the first to prove the claim. Ms. Winer's second claim

is merely a different theory of recovery from her first claim and both claims are based on the identical underlying transaction or occurrence. Therefore, there is an identity of cause of action between the first litigation and the second litigation.

IV. **WINER IS ESTOPPED FROM CLAIMING THAT HER CAUSE HAS NOT BEEN LITIGATED ON THE MERITS. MS. WINER APPEARED IN COURT ON DECEMBER 9, 1987 AND PRESENTED PROOF OF HER DAMAGES EX PARTE.**

At the conclusion of the presentation of her evidence, Judge Waters entered judgment for the plaintiff in the amount of $150.00 plus court costs in the amount of $13.00 and interest thereon from the date of judgment. Assuming arguendo that Ms. Winer failed to present evidence within regard to each of the items enumerated on the Warrant in debt filed in the first claim, she nonetheless had the opportunity to present evidence. If for whatever reason she failed to sustain her burden of proof with regard to said items, she is now precluded from attempting to prove her damages on a second occasion. Therefore, she had her day in court to litigate her damages and she is estopped from claiming that her cause has not been

litigated on the merits.

BEST AVAILABLE COPY

CONCLUSION

The petitioner has failed to set forth any compelling reasons for this court to grant a writ of certiorari and review this case in full. This cause lacks a substantial question for the Supreme Court of the United States to review.

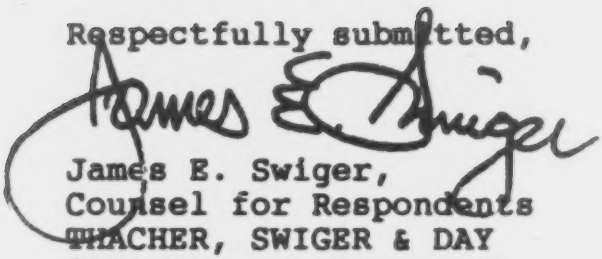
Notwithstanding the foregoing, it is readily apparent upon a review of the facts and decisions of the courts below that this cause has previously been properly adjudicated. Accordingly its dismissal was proper. For the reasons expressed herein

Nixon, Pres

Trucks, I Aut

respectfully request that this court affirm the action of the Supreme Court of Virginia and the Circuit Court of Fairfax County, Virginia and deny the petitioner's request.

Respectfully submitted,



James E. Swiger,
Counsel for Respondents
THACHER, SWIGER & DAY
3975 University Avenue
Suite 450
Fairfax, Virginia 22030
(703) 385-7000
Todd D. Bunn on Brief